(3)

FILED

MAR 17 1997

CLERK

No. 96 - 1243

In The

Supreme Court of the United States

OCTOBER TERM 1996

ROBERT CARLEN, M.D.

Petitioner,

- v -

DEPARTMENT OF HEALTH SERVICES;
DAVID HARRIS, M.D., Individually and as former Commissioner of the Suffolk County Department of Health Services;
SUFFOLK COUNTY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

KATHLEEN A. CARLSSON
Attorney for Petitioner
Carlsson and Carlsson
17 Main Street
Sayville, New York 11782
(516) 589 1221

6 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS

ARGUMENT

POINT I. THIS CASE PRESENTS A NOVEL QUESTION OF FEDERAL LAW, THE SUBSTANCE OF WHICH, THE TRUSTWORTHINESS OF EMPLOYED PHYSICIANS, IS CAUSING MILLIONS OF AMERICANS GREAT ANXIETY. THE SUPREME COURT HAS JURISDICTION UNDER RULE 10(C) 1

POINT II. UNDER STATE LAW, TWO WHOLLY OPPOSED DETERMINATIONS OF ALL THE FACTUAL AND LEGAL ISSUES, WITH NO MEANS OR MECHANISM TO RECONCILE THEM, LEAVE THE ENTIRE CONTROVERSY UNRESOLVED. THE OPPOSED OUTCOMES OFFER NO GUIDANCE TO THE MANY SIMILARLY-SITUATED DOCTORS WHO MUST PROVIDE MEDICAL CARE AND TO THEIR PATIENTS WHO MUST RECEIVE IT, BUT WHO DO NOT KNOW WHAT THEY HAVE A RIGHT TO EXPECT 2

CONCLUSION 4

TABLE OF CITATIONS

Rules

U.S. Supreme Court, Rule 10 1

Other

Pear, R. "Congress Weighs More Regulation on Managed Care," *New York Times*, March 10, 1997, p. A1, col. 8 2

ARGUMENT

POINT I

THIS CASE PRESENTS A NOVEL QUESTION OF FEDERAL LAW, THE SUBSTANCE OF WHICH, THE TRUSTWORTHINESS OF EMPLOYED PHYSICIANS, IS CAUSING MILLIONS OF AMERICANS GREAT ANXIETY. THE SUPREME COURT HAS JURISDICTION UNDER RULE 10(C).

The respondents have consistently tried to trivialize this controversy, characterizing it as a local affair in which "all [Dr. Carlen] is seeking is yet another review of his termination from employment" (brief in opposition, *i*). They argue that Dr. Carlen has failed to offer any "compelling reasons" in compliance with Rule 10, for the Supreme Court to review this case.

The U.S. Court of Appeals for the Second Circuit has decided an important question of federal law that has not been, but should be, settled by this Court (Rule 10(c)). Dr. Carlen has alleged violation of fundamental constitutional rights, which District Court should adjudicate *de novo* instead of favoring one state law determination (the county's and the state court's) over the other (the state health department's).

In this case, the first of its kind in the United States, Dr. Carlen asks this court to decide whether a licensed physician can be fired from a job he was otherwise entitled to keep, for refu..ig to compromise his best professional judgment and for maintaining his fiduciary relationship to his patients, or whether, to continue to earn his living, he had to deceive his patients and give them treatment he didn't approve of, while saying nothing of his true opinion on their official medical record.

In short, this is a case about the trustworthiness that's at

the very heart of medical practice. We scarcely exaggerate when we say that the issue presented, with its ramifications, is whether there will continue to be a medical profession in America.

The Supreme Court should grant certiorari because of the enormous public concern that employed physicians, who now constitute about half the practicing doctors in the United States, have been forced to abandon the professional obligations that Dr. Carlen refused to, and are now simply tools, creatures and mouthpieces of their employers.

State legislatures and executive departments, the federal executive, and soon, perhaps, the Congress (Pear, R. "Congress Weighs More Regulation on Managed Care," *New York Times*, March 10, 1997, p. A1, col. 8), have enacted laws and regulations prohibiting some of the gagging of physicians, prohibiting "drive-through" childbirth, requiring inpatient stays for mastectomies, etc. But these piecemeal efforts cannot possibly address every clinical situation, every organ system, every surgical procedure, and, for this reason, are doomed to failure as a comprehensive or global solution to today's widespread concerns.

There is, however, a class of people who have dealt and can continue to deal with every problem that any patient might present, namely, the members of the medical profession, who can and will exercise their professional judgment, but not if doing so costs them their livelihood.

We add that although governmental health employers are free of the taint of lucre that attaches to health maintenance organizations and other profit making enterprises, from the point of view of a physician-employee who receives professional orders he disagrees with, all employers are the same. Their motive is irrelevant.

POINT II

UNDER STATE LAW, TWO WHOLLY OPPOSED DETERMINATIONS OF ALL THE FACTUAL AND LEGAL ISSUES, WITH NO MEANS OR MECHANISM TO RECONCILE THEM, LEAVE THE ENTIRE CONTROVERSY UNRESOLVED. THE OPPOSED OUTCOMES OFFER NO GUIDANCE TO THE MANY SIMILARLY-SITUATED DOCTORS WHO MUST PROVIDE MEDICAL CARE AND TO THEIR PATIENTS WHO MUST RECEIVE IT, BUT WHO DO NOT KNOW WHAT THEY HAVE A RIGHT TO EXPECT.

This litigation is in its eleventh year, but no issue of fact or law has ever been resolved.

Dr. Carlen must maintain his medical license to continue practicing in New York State, including practicing in the employ of the respondents, who know that their own employee, Dr. Greenberg, initiated the state's investigation of Dr. Carlen. The respondents also know, directly, that the New York State Department of Health supoened from them all their charges against Dr. Carlen and the medical records upon which they were based.

The respondents deal with the state's wholly opposed conclusion ("no evidence of misconduct") by completely ignoring it, but others, including Dr. Carlen, do not have this luxury. The national uproar we discussed above shows that other physicians are getting squeezed between their employers' demands and the requirements of the state licensing and disciplinary agencies.

Both the Appellate Division of the New York Supreme Court, and New York State through its education (Commissioner Ambach) and health departments, have issued final, unappealable, and completely contradictory determinations. So which one are doctors to obey? Should they put their employer ahead of their

patients (the respondents' and the appellate court's view), or their patients ahead of their employer (the plaintiff's and the state's view)?

Perhaps the Appellate Division really meant, although it certainly didn't say, that Dr. Carlen did not have civil service protection, that if he disagreed with the professional orders he was given he should simply have quit. (The alternative would require the court to accept the Nuremberg defense.) But where could Dr. Carlen have gone?

Because of the massive transformation of practice arrangements since this litigation began (which Dr. Carlen correctly foresaw), and because, sooner or later, professional disagreements must occur, his getting a different job would just transfer the controversy to a different venue. And so eventually, every physician must buckle while hoping the licensing authorities don't catch him, because none can tolerate the economic and psychological stresses of repeated firings.

CONCLUSION

Because of the novelty and public importance of the issues presented, and because of their total absence of resolution and of guidance to others after ten years of litigation, the U.S. Supreme Court should grant Dr. Carlen's petition for a writ of certiorari.